

# ENFORCEABILITY OF NONCOMPETE AGREEMENTS IN THE BUCKEYE STATE: HOW AND WHY OHIO COURTS APPLY THE REASONABLENESS STANDARD TO ENTREPRENEURS

ADAM V. BUENTE\*

## I. INTRODUCTION

In the buildup to the heated 2012 presidential election, both candidates delivered strong campaign rhetoric that enforced their vastly different theories on how to turn around the then-struggling economy. One important economic issue on which they did agree, however, was that entrepreneurs and small businesses would be the driving force behind America's long-term economic revival. Governor Mitt Romney, the Republican nominee, simply stated, "small business creates the jobs in America."<sup>1</sup> Meanwhile, President Barack Obama declared: "We believe small businesses are the engine of economic growth in this country."<sup>2</sup>

For many entrepreneurs, the first step to starting a business occurs long before renting a space, incorporating a venture, filing for a copyright or hiring new employees. The entrepreneur's first step—and oftentimes the most difficult—is the decision to leave his or her current employer. In the past decade, this decision has become far more complicated than simply putting in a two-week notice, as employers across the country "are now much more likely to require employees to sign [noncompete] agreements as a condition of employment."<sup>3</sup> This practice is even more formidable

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\*Juris Doctor, The Ohio State University Moritz College of Law, expected 2014.

<sup>1</sup> Rohit Arora, *Small Business BIG Topic During Presidential Debate*, FOX BUS. (Oct. 4, 2012), <http://smallbusiness.foxbusiness.com/entrepreneurs/2012/10/04/small-business-big-topic-during-presidential-debate/>.

<sup>2</sup> Catherine Ho, *Obama Supports Tax Incentives to Move Jobs to U.S.*, WASH. POST (May 13, 2012), [http://articles.washingtonpost.com/2012-05-13/business/35458427\\_1\\_tax-incentives-move-jobs-tax-credit](http://articles.washingtonpost.com/2012-05-13/business/35458427_1_tax-incentives-move-jobs-tax-credit).

<sup>3</sup> Pierre H. Bergeron, *Navigating the "Deep and Unsettled Sea" of Covenant Not to Compete Litigation in Ohio: A Comprehensive Look*, 31 U. TOL. L. REV. 373, 373 (2000).

considering the fact that employers are now also much more likely to file suits against previous employees to enforce these noncompete agreements.<sup>4</sup>

It is therefore critical that both employers and employees understand the ramifications of drafting and signing these noncompete agreements. Unfortunately, the Ohio Supreme Court has provided little guidance on the issue, adopting a laissez-faire approach to noncompete litigation and primarily allowing the state's trial courts to decide noncompete litigation on a case-by-case basis.<sup>5</sup> This confusion has resulted in employers not understanding the enforceability of noncompete agreements, while employees do not understand the implications of signing the agreements.<sup>6</sup> In other words, many employers and employees simultaneously believe that Ohio's trial courts have created a standard that has "stacked the deck" against them in terms of noncompete litigation.

This note seeks to provide practical information and advice to Ohio's attorneys and small business owners in regard to Ohio courts' enforcement of noncompete agreements in the employment arena. More specifically, this note will attempt to explore the perception among a growing number of Ohio's trial attorneys that Ohio courts enforce the "reasonableness" standard too strictly against employees. This note will narrow its focus to the entrepreneurial context, or, in other words, cases involving situations where an employee has potentially breached a noncompete agreement to start his or her own business. Notably, this note does not seek to explore in-depth issues concerning consideration (for both contractual and at-will employees), assignment, the statute of frauds, estoppel, wrongful termination by the employer or remedies available to either party for breach (including liquidated, compensatory and punitive damages for injunctive relief).

First, this note seeks to set a foundation for the pros and cons—or the necessities and burdens—of noncompete agreements in the employment context.<sup>7</sup> Next, it offers a brief background discussion of the development of Ohio's case law regarding noncompete agreements.<sup>8</sup> It then provides a narrow discussion of how Ohio courts have ruled on cases in the entrepreneurial context in a variety of industries, including service-based

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<sup>4</sup> *Id.*

<sup>5</sup> Kollin L. Rice, *Ohio Law Governing Employee Covenants Not to Compete: A Practitioner's Guide to Current Trends and the Impact of Ohio's Adoption of the Uniform Trade Secrets Act*, 23 OHIO N.U. L. REV. 347, 361 (1996) ("For the most part, it seems the courts will assess each dispute over restrictive covenants based on the individual facts. As such, it is difficult, if not impossible, to draft such an agreement in a manner which will insulate the drafter from litigation challenging its validity or its interpretation.").

<sup>6</sup> Bergeron, *supra* note 3.

<sup>7</sup> See discussion *infra* Part II.

<sup>8</sup> See discussion *infra* Part III.

startup companies, businesses in the public interest (such as doctors, lawyers, etc.) and high-tech startup companies.<sup>9</sup> This note then offers suggestions to both employers and employees on how to confront the problems raised by noncompete agreements.<sup>10</sup> This note concludes with a brief discussion of the current law in Ohio and how employers and employees should move forward.

Ohio's enforcement of noncompete agreements in the entrepreneurial context is fairly reasonable in light of the many issues raised by such covenants. The flexibility of the reasonableness standard set forth in *Raimonde v. Van Vlerah*<sup>11</sup> has allowed trial courts to reach what I would argue are fair and equitable results in more decisions than not. This same flexible standard, however, is also responsible for the growing frustration among parties, as even the most seasoned trial attorneys have a difficult time predicting whether a trial court will find a covenant to be reasonable or unreasonable in light of the circumstances.<sup>12</sup> For this reason, this note encourages both employers and employees to negotiate and understand specific terms of the noncompete agreement during the drafting process—not following a term's potential breach.

## II. A GENERAL OVERVIEW OF NONCOMPETE AGREEMENTS

The most recent employment data show that employees are highly mobile in today's modern economy.<sup>13</sup> Consequently, employees feel that this mobility should be disturbed by trial courts in very limited circumstances, while employers include noncompete agreements in employment contracts to protect their investments in human capital.<sup>14</sup> As one scholar dramatically noted, "[t]his is a war about competition and unfair competition, an attempt to balance an employer's desire to protect its business assets and the employee's interest in professional mobility. And it is a delicate balance."<sup>15</sup> Noncompete agreements thus provide courts with a

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<sup>9</sup> See discussion *infra* Part IV.

<sup>10</sup> See discussion *infra* Parts V, VI.

<sup>11</sup> *Raimonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975).

<sup>12</sup> Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 485 (1990).

<sup>13</sup> Dan Schawbel, *How to Know Whether You Should Switch Employers*, TIME (Apr. 11, 2012), <http://business.time.com/2012/04/11/how-to-know-whether-you-should-switch-employers/>.

<sup>14</sup> For an exploration into the term "human capital," see discussion *infra* Part II.

<sup>15</sup> Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107, 110 (2008).

unique situation, as both employers and employees have very strong policy arguments regarding the enforceability of these covenants.

This section will examine these important policy arguments from a mostly economic lens. Part A offers a brief discussion of statistical data regarding the increasing mobility of employees in today's modern economy, which provides an argument both for and against enforcing noncompete agreements. Part B and Part C then delve into these arguments in more depth. Part B provides a discussion regarding employers' significant investment in human capital, the central argument for enforcement of noncompete agreements. Part C sets forth the employees' principal counterargument: strict enforcement of noncompete agreements causes economic harm and slows the natural spread of ideas.

#### A. *Why Businesses Draft Noncompete Agreements*

A recent study found that employees expect to stay at a company for nearly five years when they are initially hired, yet most only stay half of that time.<sup>16</sup> Furthermore, the average adult will have "about nine jobs between the ages of 18 and 32."<sup>17</sup> This high employee turnover has created significant challenges for employers to protect their employees<sup>18</sup>—usually the company's most important asset.<sup>19</sup> Thus, many employers now require both contractual and at-will employees to sign an employment contract that includes a noncompete agreement, a covenant that usually limits the employee's use of important trade secrets and limits the employee's future employment interests in terms of duration and geographic scope.<sup>20</sup>

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<sup>16</sup> Schawbel, *supra* note 13.

<sup>17</sup> *Id.*

<sup>18</sup> See John Dwight Ingram, *Covenants Not to Compete*, 36 AKRON L. REV. 49, 49 (2002) ("[M]ore than fifty years ago, most people expected to work for their initial employers for their entire careers, and indeed many have done just that. Presently, that is no longer the case. Many people will change employers, and even industries, several times over their working years. This increased mobility has added greatly to the opportunities of workers, but it has also created serious problems for employers who want to protect their trade secrets, confidential information, and goodwill.").

<sup>19</sup> Deepti Dhaval, *Employees Are the Most Important Asset of Every Company as They Can Make or Break a Company's Reputation and Profitability.*—Kiril Maranov, EBRANDZ (Aug. 17, 2011), <http://news.ebrandz.com/small-business/2011/4458--employees-are-the-most-important-asset-of-every-company-as-they-can-make-or-break-a-companys-reputation-and-profitability-kiril-marinov.html/>.

<sup>20</sup> Whitmore, *supra* note 12, at 484 ("Covenants in employment contracts which restrict postemployment activities of an employee are increasingly common in modern times.").

Despite the fact that these covenants were originally considered to be in restraint of trade and unenforceable,<sup>21</sup> almost all state courts now use one of three standards—(1) the all-or-nothing approach, (2) the “blue-pencil” doctrine, or (3) the judicial modification standard—to enforce these covenants.<sup>22</sup> Regardless of which standard is used, the trial court’s central focus in noncompete litigation in the employment context centers around various policy considerations, usually phrased as a “reasonableness” test specifically applied to the noncompete agreement at issue.<sup>23</sup> It is therefore critically important to consider the policy arguments for both the employer and the employee to understand why courts strictly enforce, revise, or in some cases, completely strike previously agreed-upon noncompete agreements.

### *B. The Necessity for Noncompete Agreements*

Contrary to popular belief, employers do not draft and require employees to sign noncompete agreements solely to spite employees who have decided to leave the company for what they perceive to be a better business opportunity. Employers have incredibly strong business and monetary incentives to protect what many people believe to be their most important asset: employees.<sup>24</sup> Indeed, while “[t]oday’s market is extremely tough,” elite employees—those who are highly educated, skilled and motivated—are often aggressively sought after by competing businesses because “[w]orkers who take pride in what they do, show up on time, give their all and stay until a job is completed can be very difficult to find.”<sup>25</sup>

In noncompete litigation, most courts require employers to show that they are enforcing the agreement to protect a “legitimate employer

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<sup>21</sup> Jon P. McClanahan & Kimberly M. Burke, *Sharpening the Blunt Blue Pencil: Renewing the Reasons for Covenants Not to Compete in North Carolina*, 90 N.C. L. REV. 1931, 1933 (2012) (“[T]he acceptance of covenants not to compete in contract law is a relatively recent phenomenon. Initially at common law, such covenants were disallowed because they represented invalid restraints on trade. Courts were wary that restrictive covenants would negatively impact competition, encourage monopolies, and drive up prices.”).

<sup>22</sup> *Id.* at 1935.

<sup>23</sup> Ingram, *supra* note 18, at 50.

<sup>24</sup> Dhaval, *supra* note 19.

<sup>25</sup> *How to Keep Your Employees from Going to Another Company*, CHECKPOINTHR (Apr. 13, 2011), <http://www.checkpointhr.com/industry-articles/how-to-keep-your-employees-from-going-to-another-company/>.

interest.”<sup>26</sup> Despite the fact that some scholars argue that employers should bear the burden of proving more to state a prima facie case,<sup>27</sup> courts frequently allow employers to argue that the monetary investment in human capital is the “legitimate interest” they are seeking to protect.<sup>28</sup> This investment in “human capital,” commonly defined as “the acquired skills, knowledge, and abilities of human beings,”<sup>29</sup> is essential since many companies depend on the intelligence, experience, proficiency and innovation of their employees to remain competitive.<sup>30</sup> This is especially true for businesses in markets that require employees with highly specialized knowledge,<sup>31</sup> such as software engineers or public relations officers.

Investment in human capital, for both large corporations and small businesses, requires significant time and money. Notably, businesses invest a substantial amount of money before even hiring a new employee because a company must first determine whether hiring an extra employee is a financially sound decision.<sup>32</sup> In simple terms, this is accomplished by offsetting a new employee’s salary, benefits and training with the potential

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<sup>26</sup> Chiara F. Orsini, Comment, *Protecting an Employer’s Human Capital: Covenants Not to Compete and the Changing Business Environment*, 62 U. PITT. L. REV. 175, 176 (2000).

<sup>27</sup> E.g., Kate O’Neill, ‘Should I Stay or Should I Go?’—*Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L.J. 83, 86 (2010) (“The employer ought to have the burden to produce clear and convincing evidence for the legitimacy of its business interest if it seeks injunctive relief before a trial on the merits and it should have the burden of proof on this issue if either party moves for summary judgment and at trial.”).

<sup>28</sup> Orsini, *supra* note 26, at 175.

<sup>29</sup> Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 300 (2006) (footnote omitted).

<sup>30</sup> Orsini, *supra* note 26, at 175.

<sup>31</sup> *Id.*

<sup>32</sup> Bishara, *supra* note 29 (“Underlying the concept [of human capital] is the notion that such skills and knowledge increase human productivity, and that they do so enough to justify the costs incurred in acquiring them. It is in this sense that expenditures on improving human capabilities can be thought of as ‘investment.’ Specific human capital is an individual employee’s earning potential and skills that are only useful in a specific work situation—essentially they are non-transferable, firm-specific skills that are not valuable to a third party (i.e., another employer). An example of specific skill training is when an employer invests in training an employee on how to navigate that particular employer’s filing system. In this instance the skill of understanding *that particular* filing system is not useful to another employer (leaving aside the fact that the employee could develop some general filing acumen).” (footnotes omitted)).

additional revenue that the employee could generate in his or her first year.<sup>33</sup> Businesses, especially those in high-tech fields (such as websites that provide products or services solely through the Internet, or firms that provide such services to larger corporations), also invest a significant amount of time in the recruiting process.<sup>34</sup>

Once an employee is hired, companies invest time and money in training the employee.<sup>35</sup> Some companies have offered less training than they previously provided—largely due to the “Great Recession”—while others have expanded investment in employee training in order to minimize employee turnover.<sup>36</sup> This temporal and monetary investment in new employees has the potential to be a great waste if a company has high employee turnover.<sup>37</sup>

In addition to the recruiting and training process, perhaps the most significant investment a company makes in human capital involves company knowledge, trade secrets and industry experience.<sup>38</sup> Ohio courts, in particular, will almost always enforce a noncompete agreement to the “extent necessary to protect trade secrets.”<sup>39</sup> The line between knowledge and a trade secret, however, is admittedly blurry, resulting in very difficult problems for the courts.<sup>40</sup> Most notably, the proliferation of technology and data—especially on the Internet—has made it all the more difficult for companies to protect their trade secrets and industry knowledge.<sup>41</sup>

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<sup>33</sup> *Should You Hire Someone?*, U.S. CHAMBER OF COMMERCE SMALL BUS. NATION, [http://www.uschamberssmallbusinessnation.com/toolkits/guide/P05\\_0005/](http://www.uschamberssmallbusinessnation.com/toolkits/guide/P05_0005/) (last visited Mar. 30, 2013).

<sup>34</sup> See Orsini, *supra* note 26 (“Companies spend a considerable amount of money recruiting qualified employees, training them, and retaining them.”).

<sup>35</sup> *Id.*

<sup>36</sup> Mary Beth Lehman, *Investment in Employees Pays Off*, DAYTON BUS. J. (Apr. 27, 2009), <http://www.bizjournals.com/dayton/stories/2009/04/27/smallb1.html?page=all/> (citing a medical manufacturing company that invested \$150,000 to “retrain” its employees, resulting in a 38% profit).

<sup>37</sup> Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1301 (2005) (“Much like any other investment, employers will invest in training only if they can recoup that investment by exploiting the skills of those who receive the training. In that sense, human capital is indistinct from nonhuman capital . . .”).

<sup>38</sup> Orsini, *supra* note 26, at 176–77 (highlighting the employer’s legitimate interest in protecting this information).

<sup>39</sup> Rice, *supra* note 5, at 351.

<sup>40</sup> Ingram, *supra* note 18, at 51–52 (“It is often difficult to draw the line between knowledge, skill, and experience, on the one hand, and trade secrets and confidential information on the other.”).

<sup>41</sup> Orsini, *supra* note 26, at 178–79.

Thus, employers invest a significant amount of money, time and knowledge in recruiting, training and retaining their employees. This investment in human capital is a short-term economic sacrifice<sup>42</sup> that a company must protect in order to be successful in the long term. This becomes even more true when one realizes that "once an employer has paid for training, an employee forever retains monopoly power over his skills, which can be used to obtain additional compensation from competing businesses."<sup>43</sup> Ultimately, one of the most effective and frequently used methods an employer utilizes to protect this investment is to include a noncompete agreement in the employment contract.<sup>44</sup>

Moreover, when properly drafted and enforced,<sup>45</sup> a noncompete agreement arguably serves to protect already established small businesses. In a hypothetical scenario, imagine that Urban works at Brady's car dealership, which has been in business for twenty-five years. One might think that if Urban wanted to leave Brady's company to start his own car dealership, it would help expand small business and create jobs. If Urban's car business is within close proximity to Brady's dealership and ultimately becomes more successful, however, Brady might have no other choice but to lay off employees in order to offset revenue losses attributable to Urban's new powerhouse dealership. Thus, any jobs created by Urban's new car dealership could be at the expense of Brady's already well-established dealership. Theoretically, therefore, properly drafted and enforced noncompete agreements should not have a substantial negative effect on the job market, because currently established small businesses would be protected.

### C. *Unnecessary Burdens Caused by Noncompete Agreements*

Not all noncompete agreements are created equally. Again, the reasonableness of a noncompete agreement is determined by the particular circumstances of the case.<sup>46</sup> Most courts can modify or invalidate a

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<sup>42</sup> Kevin Hollenbeck, *Employer Motives for Investment in Training 1* (Nov. 15, 1996) (unpublished conference paper), available at <http://research.upjohn.org/cgi/viewcontent.cgi?article=1048&context=confpapers> ("The costs of the training include the foregone productivity of the trainee, lost productivity of supervisors or co-workers who engage in the training activity, and the costs of providing training materials and providers. These costs are borne by the employer . . .").

<sup>43</sup> Long, *supra* note 37.

<sup>44</sup> *Id.* at 1295 ("Saddled with the challenge of competing for top talent, employers frequently use noncompetition clauses ('noncompetes') in employment agreements to guard against employee defections." (footnote omitted)).

<sup>45</sup> See discussion *infra* Part V for a more in-depth discussion of drafting noncompete agreements.

<sup>46</sup> McClanahan & Burke, *supra* note 21, at 1935.



noncompete agreement if it is found to be unreasonable.<sup>47</sup> In other words, the covenant will be unenforceable if the legitimate interests the employer is seeking to protect are outweighed by the harm enforcement would cause both to the individual employee and the public at large.<sup>48</sup>

Employees in general, however, are likely to suffer harm if they reside in a state that strictly enforces noncompete agreements.<sup>49</sup> Studies have shown that enforcement can have a negative impact on both contractual and at-will employees.<sup>50</sup> A recent Harvard Business School study observed post-legislation enforcement of noncompete agreements in Michigan and found that job mobility decreased slightly more than eight percent and “nearly twice that much for workers with highly specialized skills . . . .”<sup>51</sup> The study also showed that employees “who had . . . left jobs . . . often left that particular industry and took jobs with lower compensation because they couldn’t use their skills.”<sup>52</sup> These findings understandably provide employees, especially those in the high-tech industry,<sup>53</sup> with an argument that strictly enforced noncompete agreements hurt economic growth.

Furthermore, employees often have little bargaining power when entering into an agreement with a new employer.<sup>54</sup> Since almost all states enforce noncompete agreements to some extent,<sup>55</sup> both at-will and

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<sup>47</sup> *Id.*

<sup>48</sup> 17 OHIO JURISPRUDENCE § 107 (3d ed. 2012); *see also* *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 116 (3d Cir. 2003) (“[A court] must balance the employer’s protectable business interest against the oppressive effect on the employee’s ability to earn a living in his or her chosen profession, trade, or occupation.” (quoting *Hess v. Gebhard & Co.*, 808 A.2d 912, 923 (Pa. 2002))).

<sup>49</sup> *See generally* Matthew C. Palmer, Note, *Where Have You Gone, Law and Economic Judges? Economic Analysis Advice to Courts Considering the Enforceability of Covenants Not to Compete Signed After At-Will Employment Has Commenced*, 66 OHIO ST. L.J. 1105, 1129–36 (2005).

<sup>50</sup> Jacquelyn Gutc, *Non-Compete Agreements May Restrict Employees’ Mobility, but Experts Say They Have Benefits*, WORCESTER BUS. J. ONLINE (Sept. 3, 2012), <http://www.wbjournal.com>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Bishara, *supra* note 29, at 310 (“Covenants not to compete are in tension with fostering employee mobility and knowledge spillovers that encourage innovation in the high-tech arena. It is particularly attractive to ban, or severely limit, noncompetes in the high-tech sector, where the uninhibited exchange of ideas can lead to innovation from information spillovers.”).

<sup>54</sup> O’Neill, *supra* note 27, at 91.

<sup>55</sup> Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 778 (2011) (“From the 2009 ranking data, forty-nine states (96%) and the District of Columbia allow some sort of noncompete

contractual employees across the country are often subjected to such covenants. The relative ease with which employers can state a cause of action, and consequently get through the pleading stages of litigation, makes the agreements all the more formidable against employees.<sup>56</sup> In particular, the near complete lack of bargaining power for at-will employees has led some commentators to argue that any noncompete agreement between the parties is void due to a lack of consideration in the underlying contract.<sup>57</sup>

These economic policy arguments against enforcement of noncompete agreements provide a strong rebuttal to the policy considerations that support even moderate enforcement of the agreements. Yet, forty-nine of the fifty states enforce the agreements to some degree.<sup>58</sup> Whether this is because of courts following the common law's traditional enforcement of freedom of contract<sup>59</sup> is not the subject of this note; instead, this note will next seek to explore how Ohio courts enforce noncompete agreements in light of these policy considerations.

### III. ENFORCEMENT OF NONCOMPETES IN OHIO

Prior to 1975, the Ohio Supreme Court utilized the "blue pencil" test to enforce noncompete agreements.<sup>60</sup> This test allowed courts to strike unreasonable provisions from a noncompete agreement, but a court "could not mend or modify the agreement."<sup>61</sup> The Ohio Supreme Court abandoned

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enforcement. Within that broad range of enforcing states, twelve states (20%) strongly enforce noncompetes . . .").

<sup>56</sup> O'Neill, *supra* note 27, at 90 ("The relative ease with which an employer can state a prima facie case of breach of contract when an employee engages in activities that appear to violate the terms of a covenant—whether or not those terms will ultimately be deemed reasonable—affords an employer considerable leverage . . . . That leverage is, of course, the reason that employers want to add contractual claims to the arsenal of public law protections for proprietary information and assets." (footnote omitted)).

<sup>57</sup> See *id.* at 117–18 ("[T]he employee's at-will status allows the employer relatively unfettered power to alter the terms and conditions of employment, perhaps disadvantageously, while yet insisting upon the post-employment restraints to which she assented.").

<sup>58</sup> Bishara, *supra* note 55.

<sup>59</sup> Brian Kingsley Krumm, *Covenants Not to Compete: Time for Legislative and Judicial Reform in Tennessee*, 35 U. MEM. L. REV. 447, 451–52 (2005) (briefly summarizing the common law shift from "restraint of trade" to the "reasonableness" test).

<sup>60</sup> See generally *Briggs v. Butler*, 45 N.E.2d 757 (Ohio 1942); Bergeron, *supra* note 3, at 375.

<sup>61</sup> Bergeron, *supra* note 3, at 375.

this test in 1975 and adopted a “reasonableness” test.<sup>62</sup> The Court’s holding, however, has provided little guidance to Ohio’s trial courts. Unfortunately, even the most seasoned trial attorneys sometimes have a difficult time predicting how a trial court will rule on a particular noncompete agreement.

Part A of this section provides important background discussion of *Raimonde v. Van Vlerah*, the Ohio Supreme Court’s leading case regarding noncompete agreements. Part B discusses the result of *Raimonde*, notably the confusion in Ohio’s trial courts as to what standard to apply to noncompete agreements. Finally, Part C offers a brief comparison of Ohio’s “reasonableness” standard to the national trend regarding enforcement of noncompete agreements.

#### *A. Ohio’s Two Tests to Determine Reasonableness*

The Ohio Supreme Court adopted the “reasonableness” test in *Raimonde v. Van Vlerah* in an attempt to achieve more consistent results in comparison to the previously used “blue pencil” test.<sup>63</sup> The reasonableness analysis articulated in *Raimonde*, however, has led to anything but consistency in Ohio’s trial courts.<sup>64</sup> This is, in large part, due to the fact that *Raimonde* appeared to announce two separate tests to determine the reasonableness of a noncompete agreements: (1) a three-prong balancing test and (2) a multitude of reasonableness factors to be weighed in light of the circumstances.<sup>65</sup> In particular, some trial courts apply the three-prong balancing test and use the reasonableness factors only as illustrative authority, while others give equal weight to the three-prong balancing test and the multitude of reasonableness factors.<sup>66</sup>

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<sup>62</sup> See generally *Raimonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975).

<sup>63</sup> *Id.* at 546–47 (“In practice, however, the [blue pencil] test has not worked well. Because it precludes modification or amendment of contracts, the entire contract fails if offending provisions cannot be stricken . . . . Thus, many courts have abandoned the ‘blue pencil’ test in favor of a rule of ‘reasonableness,’ which permits courts to determine, on the basis of all available evidence, what restrictions would be reasonable between the parties.”).

<sup>64</sup> Bergeron, *supra* note 3, at 399 (“Ohio’s law regarding covenant not to compete litigation is well-developed, though it is not always consistent . . . . [T]here is a conspicuous absence of guidance from the supreme court on many of these issues.” (footnote omitted)).

<sup>65</sup> *Id.* at 375–76.

<sup>66</sup> *Id.*

### 1. *Raimonde's Three-Prong Balancing Test*

*Raimonde* held that an employer's noncompete agreement will be enforced only to the "extent necessary to protect the employer's legitimate interests."<sup>67</sup> As previously discussed, often the legitimate interest an employer is seeking to protect is its investment in the employee, or "human capital."<sup>68</sup> Courts can uphold these covenants, overturn them or even modify them if they deem it necessary to protect the employee from undue hardship.<sup>69</sup> *Raimonde* pronounced a three-prong analysis to guide trial courts to balance this potential "undue hardship" to the employee with the "legitimate interests" of the employee:

A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.<sup>70</sup>

These factors are to be balanced against each other, with the most weight usually given to the first and second factors.

### 2. *Raimonde's Reasonableness Factors*

While this three-prong test appears to offer a relatively simple balancing test between the interests of the employer and employee, *Raimonde* arguably complicated matters by listing other factors to assist courts to "evaluate all the factors compromising 'reasonableness.'"<sup>71</sup> The additional reasonableness factors proscribed in *Raimonde* are as follows:

[1] [W]hether the employee represents the sole contact with the customer; [2] whether the employee is possessed with confidential information or trade secrets; [3] whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; [4] whether the covenant seeks to stifle the inherent skill and experience of the employee; [5] whether the benefit to the employer is disproportional to the detriment to the employee; [6] whether the covenant operates as a bar to the employee's sole means of support;

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<sup>67</sup> *Raimonde*, 325 N.E.2d at 547.

<sup>68</sup> See discussion *infra* Part III.

<sup>69</sup> *Raimonde*, 325 N.E.2d at 547 ("Courts are empowered to modify or amend employment agreements to achieve such results.").

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

[7] whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and [8] whether the forbidden employment is merely incidental to the main employment.<sup>72</sup>

Although certain factors will carry more weight in different factual contexts, Ohio courts appear to place the most emphasis on three factors: geographic scope, duration and the potential harm enforcement could cause to the public at large.

First, almost all noncompete agreements attempt to expressly prohibit the employee from competing in a particular geographic region.<sup>73</sup> Reasonableness of the covenant's geographic market is determined by the market of the employer's customer base or service area, meaning that no geographic region is per se unreasonable.<sup>74</sup> In other words, if the employer's market is the entire Midwest, then prohibiting the employee from competing in the entire Midwest could arguably be found to be reasonable, so long as other factors also favor the employer.<sup>75</sup> In more modern practice, however, employers are encouraged to draft a noncompete agreement that protects only the geographic area necessary to protect its legitimate business interests.<sup>76</sup>

Second, Ohio courts also place considerable emphasis on the time limitation expressed in the noncompete agreement.<sup>77</sup> If the time limitation is expressly stated, courts will determine whether it is reasonable based on the facts of the case, the employer's market and industry practice.<sup>78</sup> Generally speaking, Ohio courts uphold one-year limitations (so long as the other

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<sup>72</sup> *Id.*

<sup>73</sup> Bergeron, *supra* note 3, at 376.

<sup>74</sup> *Id.* (citing several Ohio cases).

<sup>75</sup> While this is often true, courts give weight to "potential injury" to the public in cases involving professionals that serve the public interest, such as doctors, lawyers or physicians. *Id.* at 380–81.

<sup>76</sup> Michael Newman & Shane Crase, *The Rule of Reason in Drafting Noncompete Agreements*, FED. LAW., Mar.–Apr. 2007, at 20, 21 ("[T]he lawyer should determine if the restrictions imposed in the noncompete agreement are geographically reasonable. Courts are less likely to enforce an agreement that restricts an employee's ability to work in an industry on a regional basis or nationwide. Depending on the nature of the employee's position and duties, such a restraint might inhibit the employee from contributing his or her talents to the workforce as a whole. Thus, the lawyer should work with the client to define the relevant marketplace in which the noncompete agreement can effectively and reasonably protect the employer's interests.").

<sup>77</sup> 17 OHIO JURISPRUDENCE, *supra* note 48.

<sup>78</sup> See generally Bergeron, *supra* note 3, at 377–78.

factors are deemed reasonable), but two-year, five-year and other time durations are viewed with more scrutiny.<sup>79</sup> The only instance in which courts will almost always find a time limitation to be per se unreasonable is when the duration is not expressly stated in the noncompete agreement.<sup>80</sup>

Third, courts are often concerned with potential economic (i.e. financial loss due to lack of competition) or market (i.e. lack of choice) injury to the public.<sup>81</sup> As previously discussed, enforcing noncompete agreements too strictly may hinder economic choice and the spread of ideas within a local or state economy. Physicians, moreover, frequently argue that noncompete agreements could potentially harm the public since the physician could no longer provide his or her services in the geographic area for a particular period of time.<sup>82</sup> Thus, when the noncompete agreement involves an employee who provides a service to the public, Ohio's trial courts will usually view a noncompete agreement with considerably more scrutiny.<sup>83</sup>

### B. Result of *Raimonde*—Confusion in the Lower Courts

The combination of *Raimonde*'s three-prong inquiry and the reasonableness factors has led to confusion in the lower courts.<sup>84</sup> Some Ohio courts only apply the three-prong reasonableness test and use the articulated factors only as illustrative authority, while others give equal weight to both the three-prong inquiry and the articulated factors.<sup>85</sup>

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<sup>79</sup> *Id.*; 17 OHIO JURISPRUDENCE, *supra* note 48; see also James H. Washington Ins. Agency v. Nationwide Mut. Ins. Co., 643 N.E.2d 143, 150 (Ohio Ct. App. 1993).

<sup>80</sup> See *Cad Cam, Inc. v. Underwood*, 521 N.E.2d 498, 502 (Ohio Ct. App.

1987) ("We have found no cases upholding as reasonable a covenant not to compete unlimited as to both geography and time. It would take an extraordinary showing to establish that an unlimited restriction against competition, anywhere . . . and at any time . . . was reasonably necessary to protect the covenantee's legitimate business interests . . ."); *Bergeron*, *supra* note 3, at 377.

<sup>81</sup> See 6 SAMUEL WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 13:1 (4th ed. 1995).

<sup>82</sup> *Bergeron*, *supra* note 3, at 380–81 ("For some professions . . . courts have determined that covenants not to compete are disfavored because their effect injures the public. One classic example is the medical profession, where doctors frequently argue that restrictions on the practice of medicine are harmful to the public and thus should be unenforceable.").

<sup>83</sup> See generally *Wall v. Firelands Radiology, Inc.*, 666 N.E.2d 235 (Ohio Ct. App. 1995).

<sup>84</sup> *Bergeron*, *supra* note 3, at 375–76 ("This apparent dual standard has contributed to confusion in the lower courts. Some Ohio courts recognize that the three-part test is the proper reasonableness inquiry, but if the court needs to modify the contract to bring it into compliance with the reasonableness rule, it should consider the longer list of factors. Others believe the longer list of factors is simply an elaboration of the three-part test.").

<sup>85</sup> *Id.*

Unfortunately, the Ohio Supreme Court's lack of decisions directly addressing noncompete agreements since *Raimonde* has only compounded the confusion for Ohio's trial attorneys and small business owners.<sup>86</sup> A practitioner representing an employer or employee is therefore advised to consult the precedent of his or her own trial court in the appropriate jurisdiction.<sup>87</sup> He or she must then determine whether the local court places more emphasis on *Raimonde*'s three-prong inquiry or the reasonableness factors.<sup>88</sup>

### *C. Contrasting Ohio's Reasonableness Test to the National Trend*

The Ohio Supreme Court's laissez-faire attitude towards noncompete agreements may run against the emerging national trend. Originally, the common law (Ohio courts included) disapproved of noncompete agreements because they were contrary to public policy.<sup>89</sup> Courts across the country then moved to a more accepting approach towards noncompete agreements, so long as the agreements protected a legitimate business interest and were not in restraint of trade.<sup>90</sup> The most common test to enforce these covenants is the reasonableness standard, which Ohio employs. Recently, however, it appears many courts and legislatures across the country have circled back to the common law's original disfavoring of noncompete agreements.

On account of today's economic conditions, some courts are now more likely to strike noncompete agreements in the employment context.<sup>91</sup> This modern trend is likely due to the "need for information sharing in the new economy," heightened employee mobility and constantly evolving technology:

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<sup>86</sup> *Id.* at 374.

<sup>87</sup> *See id.* at 381.

<sup>88</sup> *Id.* at 374–76, 399 ("If those individuals litigating covenant not to compete claims in the courts are armed with full information, then they can educate the judges and their clients. Full information should lead to more consistent decisions from the courts and more efficient litigation from the parties.").

<sup>89</sup> *Garrison & Wendt, supra* note 15, at 113–14.

<sup>90</sup> *Id.* at 114 ("[O]ver time, the common law prohibition against noncompete agreements loosened. The courts recognized that such agreements can be legitimate if they serve business interests other than the restriction of free trade. Thus, agreements not to compete ancillary to an employment relationship have been permitted, subject to a reasonableness requirement.").

<sup>91</sup> *See id.* at 111 ("[T]he opinions suggest a heightened judicial scrutiny of employee noncompete agreements, the effect of which is to restrict the enforceability of employee noncompete agreements. These recent decisions represent a full scale assault on the modern approach.").

The emerging trend in the law of employee noncompete agreements suggests that courts are generally more inclined to invalidate employee noncompete agreements than under the modern approach and that the law of employee noncompete agreements is becoming more protective of the employee's interest in mobility. This heightened scrutiny of employee noncompete agreements reflects some of the fundamental changes taking place in the economy and in the workplace.<sup>92</sup>

Furthermore, some state legislatures, including California and North Dakota, have outlawed noncompete agreements entirely.<sup>93</sup> In this respect, courts and legislatures are far more laissez-faire towards noncompete agreements than Ohio's reasonableness standard under *Raimonde*.

Despite this emerging national trend, Ohio's utilization of the reasonableness standard still falls in line with the majority of states that employ a similar test. In one way or another, a large majority of state courts continue to attempt balancing the legitimate business interests of the employers against the free market and mobility interests of the employee.<sup>94</sup> Thus, while Ohio certainly is not as employee-friendly as some states, it runs parallel to the large majority of states that employ a reasonableness standard.

#### IV. *RAIMONDE* APPLIED IN THE SMALL BUSINESS CONTEXT

Ohio's trial courts have applied *Raimonde* to a plethora of noncompete cases in a variety of industries. Generally speaking, the employer is trying to enforce the noncompete agreement against one of two types of employees: a former employee trying to start his or her own business, or, more commonly, an employee trying to work for one of the employer's direct competitors. This note seeks to focus on the former, and, in particular, highlight cases in three particular areas: (a) service-based startup companies, (b) public interest entrepreneurs (e.g., doctors, lawyers, etc.) and (c) high-tech startup companies.

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<sup>92</sup> *Id.* at 112.

<sup>93</sup> Bishara, *supra* note 55, at 757.

<sup>94</sup> Alina Klimkina, Note, *Are Noncompete Contracts Between Physicians Bad Medicine? Advocating in the Affirmative by Drawing a Public Policy Parallel to the Legal Profession*, 98 KY. L.J. 131, 136 (2010) ("Furthermore, in recent years more emphasis has been placed on employee education and training. Courts have begun to recognize a legitimate interest in the extraordinary costs of employee education and specialized training in order to validate the enforcement of restrictive covenants." (footnote omitted)).



### *A. Service-Based Startup Companies*

Ohio trial courts appear to be hesitant to completely strike noncompete agreements when an employee leaves his or her original employer to start a competing business.<sup>95</sup> This is in large part due to the fact that employees generally gain knowledge and industry experience from their previous employer.<sup>96</sup> For example, in *Copeco Inc. v. Caley*,<sup>97</sup> Caley worked at a copy business as a sales representative for two years before attempting to start his own copying business with another partner.<sup>98</sup> Although the trial court's analysis focused on whether there was adequate consideration, the court found that the noncompete agreement was reasonable in light of the particular circumstances.<sup>99</sup> Thus, Caley was not able to start his copying business within the proscribed forty-five mile radius of Copeco Incorporated for a period of eighteen months.<sup>100</sup>

Sometimes, however, a court will modify the noncompete agreement if it believes that the covenant is too broad in scope relative to the employer's legitimate business interests.<sup>101</sup> In *Rogers v. Runfola & Associates*, Rogers and a fellow coworker signed employment contracts containing noncompete agreements with Runfola, a company that provided court reporting services.<sup>102</sup> After over ten years of employment, each employee sent a letter of resignation to start their own court reporting company.<sup>103</sup> The noncompete agreement, however, prohibited Rogers and his coworker from providing court reporting services in Franklin County for two years.<sup>104</sup>

The Ohio Supreme Court held that this noncompete agreement was excessive, but also analyzed "whether some restrictions prohibiting appellees from competing [were] necessary to protect Runfola's business interests."<sup>105</sup> The court modified the covenant's scope, but defended the employer's business interest mostly in terms of its investment in human capital, long before that theory was accepted by most businesses:

The record reflects that Runfola played a large role in appellees' development as successful court reporters.

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<sup>95</sup> See generally *Rogers v. Runfola & Assocs.*, 565 N.E.2d 540 (Ohio 1991).

<sup>96</sup> *Id.* at 544.

<sup>97</sup> *Copeco, Inc. v. Caley*, 632 N.E.2d 1299 (Ohio Ct. App. 1992).

<sup>98</sup> *Id.* at 1299.

<sup>99</sup> *Id.* at 1300.

<sup>100</sup> See *id.* at 1301 (reversing the trial court, which held for Caley).

<sup>101</sup> See generally *Rogers v. Runfola & Assocs.*, 565 N.E.2d 540 (Ohio 1991).

<sup>102</sup> *Id.* at 541.

<sup>103</sup> *Id.* at 541–42.

<sup>104</sup> *Id.* at 541.

<sup>105</sup> *Id.* at 544.

While employed by Runfola, Rogers and Marrone gained valuable experience in the business which included the use of computerized technology. Runfola invested time and money in equipment, facilities, support staff and training. Much of this training and support, undoubtedly, inured to the benefit of the appellees. Runfola also developed a clientele with which appellees had direct contact.<sup>106</sup>

Ohio courts have applied the modification principles set forth in *Rogers* to other cases involving startup companies.<sup>107</sup>

Importantly, Ohio's trial courts (as well as trial courts across the country)<sup>108</sup> view employees' new businesses with scrutiny when the employees directly solicit customers of their former employer.<sup>109</sup> For example, in *American Logistics Group, Inc. v. Weinpert*, the defendant left the plaintiff-employer's financial consulting company in order to start his own similar business.<sup>110</sup> Evidence acquired during discovery showed that defendant Weinpert "secretly operated a business known as Professional Grade Macros ('PGM') out of his home while he worked for American" and charged American's customers a preferable rate in order to solicit further business from them when he left the company.<sup>111</sup>

Ultimately, after leaving American, Weinpert continued to solicit business from American's former clients.<sup>112</sup> The Eighth District Court of Appeals of Ohio affirmed the trial court's finding that American's seventy-five mile noncompete agreement was reasonable because "employers such as American rely heavily upon an active service team and close client contact."<sup>113</sup> Thus, the covenant not to compete was found to be reasonable in light of the circumstances, especially considering the fact that Weinpert solicited customers of his previous employer.

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<sup>106</sup> *Id.* at 543-44 (modifying the covenant to apply for one year and within the city limits of Columbus).

<sup>107</sup> *See Sash & Storm, Inc. v. Thompson*, No. 1-98-47, 1998 WL 852619, at \*2 (Ohio Ct. App. Dec. 11, 1998) (modifying the covenant to only limit former employee from using customer lists obtained from former employer).

<sup>108</sup> *Griffin Toronjo Pivateau, Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 703 (2008) ("Among those states that recognize customer relationships as a protectable interest . . . differences arise as to what sort of relationships may be protected. Some states require a more permanent relationship between customer and business for such a relationship to fall within the realm of protected interests.").

<sup>109</sup> *See generally Am. Logistics Grp., Inc. v. Weinpert*, No. 85041, 2005 WL 2240987 (Ohio Ct. App. Sept. 15, 2005).

<sup>110</sup> *Id.* at \*1.

<sup>111</sup> *Id.* at \*5.

<sup>112</sup> *Id.* at \*2.

<sup>113</sup> *Id.* at \*8.

These cases show that Ohio courts enforce noncompete agreements strictly but reasonably against previous employees looking to start their own service-based startup companies. Ohio courts' hesitancy to completely strike noncompete agreements in the entrepreneurial context appears to be due in large part to the fact that employers have invested a significant amount of time, finances and industry experience into their employees. Nevertheless, Ohio courts are willing to modify these covenants when they are unreasonable in light of the interests of the employee and industry practice.

### *B. Businesses in the Public Interest*

As previously discussed, Ohio's trial courts sometimes place emphasis on the third factor articulated in *Raimonde*: whether enforcement of a noncompete agreement could cause harm or injury to the public interest.<sup>114</sup> One of the most oft-cited examples is from within the medical profession,<sup>115</sup> since prohibiting doctors and physicians from providing healthcare to a community could potentially cause harm to the public's health.<sup>116</sup> These noncompete agreements, however, are not per se unreasonable, as the Sixth Circuit Court of Appeals noted:

[Holding physician's noncompete agreements to be per se unreasonable] would eviscerate entirely the protection of restrictive covenants to allow a physician to practice, contrary to the restrictive covenant, after [the physician's] employment enabled [the physician] to establish the very contacts which would allow [the physician] to destroy a practice that was established before [the physician's] employment.<sup>117</sup>

For example, in *Ohio Urology, Inc. v. Poll*,<sup>118</sup> the Tenth District Court of Appeals reversed a trial court decision that relied on the American

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<sup>114</sup> See *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975).

<sup>115</sup> *Klimkina*, *supra* note 94, at 148 ("While the courts invalidating restrictive agreements between doctors are in the minority, more jurisdictions seem to have developed a higher awareness and respect for the recommendations of the AMA. Today, more and more courts . . . are holding these covenants unenforceable for public policy reasons." (footnotes omitted) (citing another source)).

<sup>116</sup> *Bergeron*, *supra* note 3, at 380.

<sup>117</sup> See *Wall v. Firelands Radiology, Inc.*, 666 N.E.2d 235, 235, 247 (Ohio Ct. App. 1995).

<sup>118</sup> *Ohio Urology, Inc. v. Poll*, 594 N.E.2d 1027 (Ohio Ct. App. 1991).

Medical Association's Code of Ethics and held that noncompetes enforced against physicians were per se unreasonable.<sup>119</sup> The court explained:

The covenant broadly proscribes competition within a five-mile radius of Ohio Urology. There is an exception, however, for maintenance or establishment of staff privileges at an acute care hospital . . . . "[M]aintain" can be read to mean "carry on." Hence, this exception allows defendant to carry on his practice . . . .<sup>120</sup>

Thus, the court believed modification was a more reasonable remedy than completely striking the noncompete clause.

The Third District Court of Appeals provided another illustrative example in *Owusu v. Hope Cancer Center*, where Dr. Owusu signed a noncompete agreement with Hope Cancer Center (HCC) that limited his ability to practice for two years within HCC's "primary service area."<sup>121</sup> The trial court initially held that the covenant was per se unreasonable because the agreement provided no definition for the geographic scope of the "primary service area."<sup>122</sup> The court of appeals reversed, explaining, "[l]ack of a specific definition for this phrase did not make the contract void or indefinite but merely required the trial court to use rules of construction to determine what would be a reasonable meaning for the terminology."<sup>123</sup> The court of appeals ultimately held that the contract was reasonable, asserting that "primary service area" was a common term in the industry and was reasonable in light of the interests that HCC was trying to protect.<sup>124</sup>

Courts will therefore still consider the interests of employers, even in cases involving covenants with physicians, doctors and other medical practitioners, so long as they are protecting a legitimate business interest to the extent necessary for the employer. There is still a "measure of disfavor," however, for covenants restricting physicians from practicing because "[i]t is vital that the health and expectations of patients, who are rarely aware of private agreements among physicians, be adequately protected."<sup>125</sup> Thus, doctors attempting to start their own practices might receive more favorable interpretations of noncompete agreements compared to entrepreneurs in other industries. To prevail in noncompete litigation, doctors or physicians

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<sup>119</sup> *Id.* at 1030–31.

<sup>120</sup> *Id.* at 1032.

<sup>121</sup> See *Owusu v. Hope Cancer Ctr. of Nw. Ohio*, No. 1-10-81, 2011 WL 3890516, at \*1–2 (Ohio Ct. App. Sept. 6, 2011).

<sup>122</sup> *Id.* at \*4.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*4–5.

<sup>125</sup> *Ohio Urology, Inc.*, 594 N.E.2d at 1031.

must show that “the effect of the covenant will be to reduce medical services to the community or some other similar harm.”<sup>126</sup>

For other professions in the public interest, including attorneys, Ohio’s courts have remained markedly silent on the balance between the public’s interest in obtaining services and the employer’s interest in protecting its market.<sup>127</sup> Ohio’s disciplinary rules for attorneys, however, prohibit such covenants.<sup>128</sup> Thus, it is recommended that employees in other professional vocations reference the relevant code of ethics when negotiating noncompete agreements.

### *C. A Note on High-Tech Startup Companies*

The proliferation of technology has undoubtedly raised many new questions in regard to noncompete agreements. More companies are exclusively providing products or services on the Internet, while the vast majority of other companies offer an online platform so their customers can obtain similar services to those they could receive at an actual physical location.<sup>129</sup> These companies provide complex challenges to contractual laws rooted in the common law, including rules regarding noncompete agreements based on physically measurable terms (including time, duration and geographic scope).

Thus, a pertinent issue for Ohio’s courts is the enormous effect that constantly evolving technology will have on determining reasonableness, the central consideration of noncompete litigation.<sup>130</sup> For example, it is now much more difficult to determine a company’s traditional market (i.e. its geographic scope), if the company offers its product or services on an Internet website (which would, in turn, arguably create a national or international market).<sup>131</sup> Similarly, in a rapidly evolving economy, it is very difficult for courts to judge appropriate time limitations for noncompete agreements. Therefore, as technology continues to increase, finding a

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<sup>126</sup> Bergeron, *supra* note 3, at 381.

<sup>127</sup> *Id.*

<sup>128</sup> Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915, 915 (2000).

<sup>129</sup> Orsini, *supra* note 26, at 178.

<sup>130</sup> See *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (Ohio 1975).

<sup>131</sup> Orsini, *supra* note 26, at 178–79 (“The growth of the Internet also affects traditional businesses . . . . Whether it is simply through on-line advertising or by selling their products and services on the Internet, in addition to their traditional stores, these firms are being forced to adapt their procedures and resources to accommodate their on-line expansion.”).

covenant to be reasonable becomes difficult, and can establish potentially harmful precedent for future unknown technologies. Ohio's trial courts should therefore be wary of establishing too broad a precedent when ruling on cases involving the high-tech industry.

## V. PROPOSED SOLUTIONS

In the entrepreneurial context, some Ohio attorneys are correct in their observation that the trial courts uphold or only slightly modify noncompete agreements more often than the courts overturn them. This observation, however, is not the result of courts favoring corporations or big businesses; instead, courts have seemed to create quite a high standard to show that a covenant is unreasonable. This high standard is arguably reasonable in light of the important policy considerations that favor enforcement of noncompetes.<sup>132</sup> Furthermore, employers' contracts are often drafted by very experienced attorneys and signed by employees who typically do not understand the effects of what they are signing.<sup>133</sup> Thus, employees seeking counsel have usually already assented to a binding agreement with their employer that limits their ability to start a competing business.<sup>134</sup>

Theoretically, to confront the employee's potential unawareness of a noncompete agreement at the time of signing, courts could require noncompete clauses to be more conspicuous than other clauses in the contract. Such a requirement would make a noncompete clause more visible to the employee and perhaps make him or her more aware of the binding effects it could have in the future. This heightened conspicuousness requirement, however, is unlikely, given the deference Ohio courts' *laissez-faire* attitude towards noncompete agreements.<sup>135</sup>

Since assistance from the courts is unlikely to occur, the smartest and most practical solution lies at the beginning—not the end—of the employment relationship. In short, employers and small business owners should focus on drafting reasonable noncompete agreements. Meanwhile, employees should do everything they can do to be more aware of the terms of a noncompete agreement before signing the agreement. As scholars have noted, "[employment lawyers] are likely to save their clients time and

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<sup>132</sup> Newman & Crase, *supra* note 76, at 21 ("[I]t is important to recognize that both sides—employer and employee—have an interest in the substance of the agreement. In adopting the rule of reason, courts generally recognize that employees have a right to earn a living in the profession for which they have been trained." (footnote omitted)).

<sup>133</sup> Bergeron, *supra* note 3.

<sup>134</sup> *See id.*

<sup>135</sup> *See discussion supra* Part III.

money in the long run . . . . [M]ore reason [in the drafting process] should equal less litigation.”<sup>136</sup>

### *A. Drafting Reasonable Noncompete Agreements*

In drafting a noncompete agreement, an employer should not be trying to gain an unfair competitive advantage or make it impossible for the employee to leave the company and continue his or her career with a competitor. Drafting such an unreasonable agreement would make future litigation more likely and potentially freeze out future business partners. Instead, the sole focus of the employer in drafting a noncompete agreement should be the reasonableness of the covenant. The employer should weigh its legitimate business interests against those of the employee and draft an agreement that balances those interests accordingly.<sup>137</sup> Generally speaking, an employer must consider three important terms in drafting its covenant: duration, geographic scope of the covenant and the potential economic harm to the public and individual employee.<sup>138</sup>

First, in regard to duration, Ohio courts are inconsistent in establishing what limits are reasonable and what are not.<sup>139</sup> What may be reasonable for one industry may be ruled unreasonable for another. In addition, “the duration of the restriction must not unduly harm the employee by making it difficult or impossible for him to work in his chosen field and support himself and his family.”<sup>140</sup> Thus, an employer should observe not only what time limitation is reasonable within its particular industry or market, but also must look out for the special qualities that a specific employee possesses.

Second, employers should have the same concerns in regard to the geographic scope of the noncompete agreement.<sup>141</sup> Again, employers should observe what scope is reasonable within their industry, and should also consider the employee’s ability to use his or her skill, training and experience to make a living. The fact that most Ohio courts give deference to the employer to protect its legitimate business interests within its own

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<sup>136</sup> Newman & Crase, *supra* note 76, at 21.

<sup>137</sup> *Id.*

<sup>138</sup> See discussion *supra* Part III.

<sup>139</sup> Bergeron, *supra* note 3, at 377 (“Although the issue of how long a covenant not to compete remains enforceable does not depend as much on the employer’s market as does the geographic scope, Ohio courts are nevertheless remarkably inconsistent in determining what type of time limitations are reasonable.”).

<sup>140</sup> Ingram, *supra* note 18, at 70.

<sup>141</sup> Newman & Crase, *supra* note 76, at 21.

market is certainly of benefit to the employer.<sup>142</sup> Thus, if an employer can affirmatively prove that the geographic scope of the noncompete agreement is limited to its market (usually proven by showing a customer base or market), courts are likely to uphold the covenant as reasonable.

As discussed *supra* Part IV, however, this general rule is limited in cases involving employees that serve the public interest, such as doctors or lawyers. In these particular circumstances, employers must give more weight to the specific services provided by employees and not seek to prohibit them from an overbroad geographic region. Such an overbroad prohibition would decrease important services to the public and cause irreparable harm to the public at large, not just the employee leaving his or her previous employer.

Ultimately, the employer's sole goal should be to reasonably protect its established market, trade secrets and consumer base with specific and reasonable terms. The best way to accomplish this goal is for a company to thoroughly understand its established consumers and observe practices of competitors within the same industry. Employers should use this information to draft noncompete agreements that contain specific terms and limitations that are supported by legitimate business interests. In today's volatile hiring market, drafting an ambiguous or overly broad noncompete agreement is asking for future litigation from a disgruntled employee.

Ideally, the noncompete agreement should be drafted specifically for that particular employee in his or her current position. Likewise, the drafting should eliminate any "boilerplate" language. Counsel for the employer should consider the employee's education, his or her experience, previous mobility in the market and other relevant factors.<sup>143</sup> In addition, the covenant should be very explicit about the interests it is seeking to protect.<sup>144</sup> This drafting would not only eliminate ambiguity in noncompete agreements, but would likely make them more reasonable, potentially reducing future litigation costs.<sup>145</sup>

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<sup>142</sup> See generally Bergeron, *supra* note 3, at 376-77.

<sup>143</sup> Pivateau, *supra* note 108, at 698 ("The noncompete agreement should set forth, in detail, the reasons why this particular employee will be restrained from competing after the termination of his employment. The employer should consider factors such as the particular education or experience of the employee at the time of hire, the specialized training that he might receive on the job, and the specialized knowledge that he will receive while employed.").

<sup>144</sup> *Id.*

<sup>145</sup> Bergeron, *supra* note 3, at 399 ("[M]any of the problems that surface in noncompete litigation can be prevented by careful drafting.").



## *B. Understanding the Terms of a Noncompete Agreement*

In comparison to employers, employees are often at a disadvantage during the drafting process. Most employees are not present during the drafting of the noncompete agreement, do not have the knowledge that an employer has, and furthermore, do not feel that they are able to negotiate many of the terms within their employment contract. This situation ultimately creates an apparent unfair bargaining relationship, but employees must begin to become more aware of the effects of a noncompete agreement before signing.

Preferably, employees could try to obtain legal counsel to review an employment agreement before signing. People regularly obtain legal counsel for many other contractual issues, such as mortgage signings, wills, trust accounts and other important business or personal transactions. Effective legal representation at the outset of an employment relationship would likely result in a more favorable noncompete clause for the employee, which could later benefit the employee greatly if he or she decided to leave the company. Moreover, effective representation at the beginning of the employment relationship—for both parties—could potentially lead to less ill will between the employer and employee, which ultimately would lead to fewer legal disputes in the future.

Unfortunately, hiring effective legal representation is not a practical solution for the majority of employees. Some newly hired employees may have been unemployed for a prolonged period of time and may be unable to afford counsel, while others would feel that hiring legal representation would be a rather hostile way to begin a new relationship with their employer. Despite the probable lack of legal counsel, employees can combat negative terms in an employment contract if they understand the effects of the agreement before signing.

Employees are encouraged to read the entire employment agreement before signing. If the agreement contains a noncompete agreement, the employee should ask himself or herself questions regarding the same reasonableness factors that employers observe in drafting the agreement. Is the time limitation reasonable regarding this particular industry and my career goals? Is the geographic scope broader than the company's established consumer base? Would I be able to make a living in the future if I were to decide to leave the company?

If the answer to any of these questions is no, the employee should seek to bargain with his or her employer to make the terms of the noncompete agreement more reasonable in light of the circumstances. If the employer is unwilling to negotiate, the employee may have no choice but to seek legal

representation, or, perhaps more unfortunately, decline the job offer. Employees, like employers, must seek to protect their own personal career interests for both the short and long term.

Ultimately, like other important contractual terms, these proposed solutions would provide the employee with more knowledge at the beginning of the employment relationship. All too often, employees sign employment contracts with noncompete agreements without realizing the binding effects that they can have in the future. It is therefore critically important for employees to be more knowledgeable about an employment agreement at the outset of the employment relationship, not at its end.

## VI. CONCLUSION

The fact that the Ohio Supreme Court has largely deferred issues regarding noncompete agreements to the state's trial courts has frustrated and bewildered attorneys, employers and employees. Rulings appear to be inconsistent from jurisdiction to jurisdiction, which has led to misperceptions about the enforceability of these covenants by both parties; however, the Ohio Supreme Court's deference is arguably desirable due to the fact-specific nature of noncompete litigation.

A blanket holding by the Ohio Supreme Court or the state's appellate courts would likely adversely affect businesses in entirely different industries. Thus, the Court's deference goes beyond the state's trial courts and reaches industries. In other words, the lack of bright-line tests allows different industries—medical, legal, technology, etc.—to self-govern and establish their own particular reasonableness standards for noncompete agreements.

This self-governance is most malleable during the drafting of the noncompete agreement. Employers should seek to draft covenants with specific terms that are limited to protect their own legitimate interests, while employees should make certain that the covenant would not limit their ability to make a living if they were to decide to leave their current employer. Ultimately, thorough knowledge of the noncompete agreement and its terms during the drafting process would benefit both employers and employees.